BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NKESE MAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,063,764
PRESBYTERIAN MANORS, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requests review of the December 30, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Jeffrey R. Brewer, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations as did the ALJ and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held on April 4, 2013, with attached exhibits; the transcript of the Preliminary Hearing held on August 22, 2013, with attached exhibits; the Discovery Deposition of Nkese May, dated March 20, 2013, with attached exhibits and the documents of record filed in this matter with the Division.

ISSUES

On June 26, 2013, the Board found claimant failed to prove she suffered injury by accident on November 18, 2012, which arose out of and in the course of her employment, and further failed to prove she provided timely notice of that alleged accident. The Board remanded the matter to the ALJ for a determination of claimant's claimed repetitive trauma injury through a series after November 18, 2012, and for a determination of claimant's allegations of an injury by accident on December 30, 2012, and any issues associated with those claims.

On remand, the ALJ found claimant did not suffer a repetitive trauma, but rather two distinct accidents, one on November 18, 2012, and one on December 30, 2012. The ALJ also took the opportunity to revisit the issue of timely notice of the alleged November 18, 2012, accident and whether claimant suffered injury by accident arising out of and in the course of her employment on November 18, 2012, finding in claimant's favor on both issues. Dr. Whitaker was again designated as the authorized treating physician.

Respondent appeals, arguing the ALJ's Order should be reversed and the Board should find claimant failed to establish a compensable work injury in her employment on November 18, 2012, and failed to give timely notice of a November 18, 2012, work accident.

Claimant argues the ALJ's Order should be affirmed and claimant provided benefits.

The issues on appeal are:

1. Did the ALJ exceed his authority upon remand from the Board by "revisiting" issues already decided by the Board?

2. Has claimant failed in her burden of proving a compensable work-related accidental injury on November 18, 2012?

3. Has claimant failed to establish she gave the employer timely and sufficient notice of the alleged November 18, 2012, accident and work injury?

FINDINGS OF FACT

Claimant began working for respondent in May 2009. She left after three months and then returned to work as a CNA and CMA. Claimant's job duties required that she assist patients at respondent's facility.

Claimant testified that on November 18, 2012, she was assisting a patient to a wheelchair after lunch, when she felt a sharp pain in her back. Claimant took a short break and then continued with her shift. Claimant was working with Mercedes Miller on this day. Claimant testified that the pain in her back got worse when she sneezed while assisting another resident. She applied ice to her back and had someone else help Ms. Miller with the last resident. She told Ms. Miller that she was going to leave early and was going home.

Mercedes Miller, a CNA for respondent and claimant's co-worker, testified she was working with claimant on November 18, 2012, transferring a resident from a bed to a wheelchair. Ms. Miller testified they used a lift to aid them in transferring the resident. She didn't notice anything wrong with the claimant at the time they were transferring the resident, but, when they went on to the next resident claimant complained her back was

hurting as they exited his room.[1] Claimant did not say how or why her back was hurting. Ms. Miller testified claimant never complained about her back bothering her before November 18, 2012. Ms. Miller testified, at the August 22, 2013, preliminary hearing, that she was not sure how claimant injured her back and claimant simply reported that her back was hurting as they were exiting the second patient's room. Ms. Miller was also uncertain as to the actual date of this conversation.

On her way home, claimant attempted, unsuccessfully, to get gas for her car, but could not get out of her vehicle. During her discovery deposition, claimant testified she went to the emergency room on the day she stopped to get gas, when her back went really bad.[2]

Claimant was off work on November 19, and on November 20 she contacted her family physician, James Hild, D. O., who directed her to the Via Christi Hospital emergency room. Claimant testified she reported to the emergency room staff that she hurt herself at work a few days earlier while she was working.[3] However, the ER records do not indicate claimant suffered a work-related accident or injury. Where the form inquires about the mechanism of injury, it is circled "no known recent injury". The form lists both Work Comp Other and BCBS of Kansas as insurance.[4] Claimant received injections at the emergency room.

On November 21, claimant met with Dr. Hild, at Clifton Family Medicine. The history provided discusses claimant's appearance at the ER the night before. The history also indicates claimant denied any trauma to her back.[5] Dr. Hild prescribed medication and gave her a note with restrictions to not lift over 5 pounds for two weeks. The note fails to mention any connection between claimant's lifting restrictions and any work-related accident or injury.[6]

Claimant took Dr. Hild's November 21, 2012, note into work and left it in respondent's human resources (HR) box.[7] Claimant then performed her work until she was called into the office. The meeting, on November 26, 2013, involved claimant, Bonnie Jo

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[1] P.H. Trans.(Apr. 4, 2013) at 58.

[2] *Id.,* Resp. Ex. 13 at 30.

[3] *Id.* at 37.

[4] *Id.,* Resp. Ex. 3 at. 6.

[5] *Id.*, Resp. Ex. 4 at 4.

[6] *Id.*, Cl. Ex. 3.

[7] *Id.* at 14.

Rupke, former interim director of nursing, Crystal Apsley, RN staff development coordinator and Susan Brown, respondent's HR director. Claimant testified she was asked what was going on and explained she was having back pain and it occurred while she was lifting a resident in a wheelchair. She was told to clock out and leave and only return when the doctor released her. Claimant contends she reported her injury to respondent on November 18, 2012. Claimant was not given an accident report to complete at that time. However, an Employers Report of Disability Claim form completed on November 29, 2012, states claimant's claim did not arise from job activities.[8]

Claimant remained off work until she was released by Dr. Hild with no restrictions, on December 10, 2012. Claimant returned to work with the understanding that she was to do as much as she could and report back to the doctor if she had any pain. Claimant was given light duty, but as she worked, her pain returned and she went back to Dr. Hild.

Claimant testified she discussed the possibility of having an MRI with Dr. Hild, but could not afford the expense. At that point, claimant returned to Ms. Brown, and asked why her condition was not work-related. She was given an Employee Disability Claim Form on December 18, 2012, for short-term disability. On the form, claimant wrote that her back problems were work-related. She described the incident when she was assisting the patient in the wheelchair. Claimant next came to Ms. Brown on December 19, 2012, requesting a workers compensation form, which respondent's corporate office instructed Ms. Brown to give to her. The form was filled out on December 19, 2012, alleging a work-related accident on November 18, 2012.

Bonnie Jo Rupke, former interim director of nursing for respondent[9], testified she was in the November 26, 2012, meeting with Ms. Brown, Ms. Apsley and claimant, in which claimant's limited duty restrictions were discussed. They talked about why claimant was put on light duty and what light duty entailed. Ms. Rupke testified claimant did not report she injured herself at work, but instead stated she noticed the pain in her back after trying to get out of her car to fill her gas tank. There was no indication at the time of the meeting that claimant's pain was work-related. Ms. Rupke testified claimant never came to her to complain of back pain.

Ms. Apsley testified part of her job was to complete the work schedule. Ms. Apsley testified that her records show claimant worked on November 18 and 19. No complaints or problems were reported on those dates. Claimant called in sick on November 20 and 23, November 21 and 22 were holidays and claimant was off on November 24 and 25. Claimant came to work on November 26 and brought in a doctor's note with a lifting restriction of five pounds. According to Ms. Apsley, when asked if she had injured her back

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[8] *Id.*, Resp. Ex. 4 at 35.

[9] Ms. Rupke's last day of employment with respondent was December 15, 2012.

at work claimant said no.[10] Ms. Apsley echoed Ms. Rupke's testimony that claimant discussed going to the gas station and suffered pain as she attempted to get out of her vehicle.

Ms. Apsley testified claimant was told she could not work on the floor with a five pound weight restriction, that she needed to go home. Claimant was told to use vacation time until she healed, since respondent could not accommodate her. Claimant returned to work on December 11, 2012, with a note allowing her to return to work. Claimant indicated she could continue to work on the medication cart, but not the floor, until her back completely healed.

Ms. Brown testified she first became aware of claimant's back problem on November 26, 2012, when claimant brought in a doctor's note with a five pound lifting restriction. Ms. Brown asked claimant how her back pain started, and claimant responded she didn't know, but was sure it was not work-related. Claimant did mention maybe twisting while trying to get out of her car to get gas. Ms. Brown testified she was looking for claimant to show her something indicating her back pain was work-related. Since there was nothing connecting the pain to claimant's work duties, and since respondent was not able to accommodate claimant's restriction, claimant was sent home. Respondent's Exhibit 10 to the preliminary hearing, is a copy of the November 21, 2012, note from Dr. Hild limiting claimant to five pounds lifting. On the note, Ms. Brown wrote the date of November 26, 2012, and listed the people present. The handwritten note on the restriction letter also notes claimant responded she didn't know what happened to her back, when asked if her pain was work-related.

Claimant returned to Dr. Hild on December 27, 2012, complaining of low back pain which started "yesterday and she fell twice today. . . Her back pain was improving until she was lifting at work. This pain has been present for a total of 2 months now."[11]

An MRI performed on December 28, 2012, indicated severe back pain since a lifting injury on November 18, 2012. Disc bulges were noted at L1-2, L2-3, L4-5 and L5-S1, with mild stenosis at L2-3 and disc protrusion causing severe left stenosis at L4-5.[12]

In February 2013, claimant came under the care of orthopedic spinal surgeon, Mark Camden Whitaker, M.D. Claimant testified she received a series of epidural injections with Dr. Whitaker and when those did not help, surgery was recommended. She testified her back pain was getting worse and was radiating down into her legs, more on the left than the right. Claimant would like to continue treatment with Dr. Whitaker, which included

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[10] P.H. Trans. (Apr. 4, 2013) at 69.

[11] *Id.*, Resp. Ex. 4 at 14.

[12] *Id.*, Resp. Ex. 4 at 16.

surgery. Claimant lost her health insurance and has applied for Medicare to see if they will cover the surgery. Claimant is currently not working.

Claimant met with Paul Stein, M.D., on July 11, 2013, with complaints of back and leg pain. Claimant reported a new complaint of neck pain that began in June 2013. Dr. Stein examined claimant and opined that most of claimant's pain is back pain and a far lateral disk protrusion that usually produces primarily leg pain because of crowding of the nerve root in the bony tunnel or foramen. He also found that from a medical viewpoint, whatever the causation of claimant's low back pain, there was a lower back injury in December 2012 due to an aggravation of the preexisting and symptomatic back problem. Dr. Stein opined the prevailing factor in the current need for additional investigation or treatment for the lower back is the pathology causing the symptoms starting in November.

The Board's Order of June 26, 2013, remanded the matter to the ALJ for a determination of claimant's claimed repetitive trauma injury through a series after November 18, 2012, and for a determination of claimant's allegations of an injury by accident on December 30, 2012, and any issues associated with those claims. At the preliminary hearing on August 22, 2013, respondent admitted claimant suffered a fall on either December 29 or 30, 2012, and that timely notice of that accident had been provided.[13] The only question remaining from that accident date involved whether the December accident was the prevailing factor for claimant's need for medical treatment.

The preliminary hearing Order of December 30, 2013, then revisited the issues of whether claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent on November 18, 2012, and whether claimant provided timely notice of that alleged accident. The ALJ determined, based upon the same evidence utilized in the April 8, 2013, Order, that claimant had suffered personal injury by accident on November 18, 2012, which arose out of and in the course of her employment with respondent and that timely notice of that alleged accident had been provided to respondent. The evidence utilized by the ALJ in both Orders included the November 21, 2012, note from Dr. Hild[14] and the December 18, 2012, short-term disability application provided by claimant. Neither Order cites, or in any fashion, refers to K.S.A. 2012 Supp. 44-520, the Notice of Injury statute.

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[13] *Id.* (Aug. 22, 2013) at 6.

[14] *Id.* (Apr. 4, 2013), Cl. Ex. 4 at 4.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers
compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2012 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
Notice may be given orally or in writing.
(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury;

> (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The ALJ found claimant to be a credible witness in this matter. The Board is within its rights to discount the ALJ's credibility determinations and provide reasons for its findings.[15] Ms. Miller's testimony contradicted claimant's contention that she was injured while working with the first patient. The emergency room records from Via Christi indicate claimant reported no recent injury when asked about the mechanism of injury. The November 21, 2012, medical reports of Dr. Hild fail to identify any trauma to claimant's back. During the meeting with Ms. Rupke, Ms. Apsley and Ms. Brown, claimant described the incident at the gas station and denied any work-related injury. The November 29, 2012, disability claim form denies claimant's claim arose from job activities.

The Kansas Court of Appeals has held the law does not allow the Board to discount an ALJ's credibility determination of a claimant based on presumptions, suppositions, and cherry-picking record references of questionable or limited evidentiary value.[16] "When the administrative law judge has made an express or implied veracity determination, the better practice is for the Board to give its reasons when disagreeing with any such veracity determination."[17] In this instance, the records created contemporaneous with claimant's alleged accident and the testimony of numerous witnesses calls into serious question claimant's credibility. This Board Member finds claimant lacks credibility in this instance. The evidence fails to support a finding that claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent on November 18, 2012.

The ALJ determined claimant provided timely notice of her alleged November 18, 2012, accident. This determination was made both in his April 8, 2013, and December 30, 2013, Orders. However, the above findings necessitate a reversal of those Orders. As claimant was still working for respondent, the notice would necessarily need to be provided within 20 days of claimant's decision to seek medical treatment on November 20, 2012. The ALJ used both the November 21, 2012, note from Dr. Hild and the December 18, 2012, disability claim form as justification for finding notice. However, the note of

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[15] *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 837, 233 P.3d 299 (2010), *rev. denied* 293 Kan. 1107 (2012).

[16] *Lake v. Jessee Trucking*, 2013 WL 6835991, 316 P.3d 796 (Unpublished Court of Appeals Decision filed Dec. 27, 2013). A petition for review with the Supreme Court was filed on January 27, 2014.

[17] *Rausch v. Sears Roebuck & Co.,* 46 Kan. App. 2d 338, 263 P.3d 194 (2011).

November 21, 2012, from Dr. Hild provides no indication as to the time, date, place, or any particulars regarding any alleged work injury. The disability claim form dated December 18, 2012, is well beyond the 20 day statutory limit. The attempt by the ALJ to combine these two documents to justify finding timely notice violates the requirements of the statute. Claimant has failed to prove that timely notice of the November 18, 2012, accident was provided to respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant failed to prove that she suffered personal injury by accident which arose out of and in the course of her employment with respondent on November 18, 2012, and failed to prove she provided timely notice of this alleged accident. The Order of the ALJ is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated December 30, 2013, is reversed.

[18] K.S.A. 2012 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of March, 2014.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
jjseiwert@sbcglobal.net
nzager@sbcglobal.net

Jeffrey R. Brewer, Attorney for Self-Insured Respondent
jlyons@jbrewerlegal.com
jbrewer@jbrewerlegal.com

Thomas Klein, Administrative Law Judge